

WHEN THE WALLS COME A 'TUMBLIN' DOWN: A LOOK AT WHAT HAPPENS WHEN LAWYERS SIGN NON-COMPETITION AGREEMENTS AND BREAK THEM

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INTRODUCTION

An acrimonious argument, some sharp words, or doubt about the other's honesty; who knows how it all began or where it all will end? No, this is not a Note about marital discord or the start of global thermo-nuclear war. This Note will discuss what happens, and what should happen, when lawyers sign non-competition contracts that limit advertising, only to leave the firm later and break the contract.

First, it is not uncommon for companies, when hiring or training specially skilled employees, to require these employees to sign non-competition covenants. These covenants protect the company from the possibility that employees will leave and use information gained or contacts made while employed to compete against former employers. For example, the medical profession today widely uses non-competition contracts that prohibit doctors from leaving a practice to compete with it.¹ However, lawyers have enacted a self-policing rule that generally disallows non-competition contracts.² This has been done in the name of protecting client interests in having ready access to the lawyer of their choice, and, ostensibly, in giving the lawyer the right to practice law freely.³ This issue has arisen in a number of contexts, but a relatively new decision approaches this subject in an interesting way.

In a recent case decided by the Indiana Court of Appeals, Third District, a personal injury firm with three offices began to split.⁴ Sweeney and Pfeifer, two

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1. Michael G. Getty, *Enforceability of Noncompetition Covenants In Physician Employment Contracts: Confusion in the Courts*, 7 J. LEGAL MED. 235 (1986); Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Employment Agreement*, 62 A.L.R. 3d 1014 (1975) [hereinafter *Contractual Restrictions on Right of Medical Practitioner*].

2. MODEL RULES OF PROFESSIONAL CONDUCT (MRPC) Rule 5.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (MCPR) DR 2-108 (1980); ABA Comm. on Professional Ethics, Formal Op. 300 (1961); ABA Comm. on Professional Ethics, Informal Op. 1072 (1968); ABA Comm. on Professional Ethics, Informal Op. 1171 (1971). Most states have adopted either the Model Code or the Model Rules. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 13-16 (2d ed. 1994). See also Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 18-20 (1988) (discussing "The Curious Demise of Restrictive Covenants"); Robert L. Schonfeld, Case Note, 4 FORDHAM URB. L.J. 195 (1975).

3. MRPC Rule 5.6 cmt. (1983).

4. *Blackburn v. Sweeney*, 637 N.E.2d 1340 (Ind. Ct. App. 1994), *trans. denied*, 659

of the original partners (hereinafter "Sweeney"), came into conflict with Blackburn, the other founding partner, and Green, a more recent partner (hereinafter "Blackburn"), over certain funds. Sweeney then filed for an accounting and dissolution of the partnership.⁵ The original partnership agreements contained a non-competition provision that prohibited withdrawing lawyers from taking any personal injury file when they left.⁶ In the first suit, the Allen Superior Court declared the provision void, ordered an accounting for each party, and dissolved the partnership.⁷ The parties subsequently settled on a new agreement and stipulated to the dismissal of the pending litigation.⁸ It is this new agreement that warrants close scrutiny.

In the new agreement, the parties set out a specific list of several counties for each group in which the other group could not advertise, either on air or in print.⁹ However, not long after they reached this accord, Sweeney began airing television commercials in Blackburn's area.¹⁰ After learning of this violation, Blackburn asked the court "for a declaratory judgment that the [a]greement was void and unenforceable."¹¹ Nevertheless, the trial court granted partial summary judgment for Sweeney.¹²

On appeal, the Third District reversed and directed a summary judgment on remand in favor of Blackburn.¹³ The court could not find an analogous case; that is, a case with a non-competition clause between lawyers that limited advertising.¹⁴ However, the court reviewed cases where attorneys entered into contracts with clauses that provided financial penalties or disincentives for lawyers who chose to leave and compete with the firm.¹⁵ Many courts have struck down such agreements on the ground that, while they do not expressly restrict the practice of law, they do so in effect by creating a hardship for those who wish to practice law after leaving a firm.¹⁶ The court concluded that limiting advertising, like a financial penalty, indirectly but effectively restrained the practice of law.¹⁷

N.E.2d 131 (Ind. 1995).

5. *Id.* at 1341.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1341-42 & nn.1-2 (listing the counties to be divided).

10. *Id.* at 1342.

11. *Id.*

12. *Id.*

13. *Id.* at 1345.

14. *Id.* at 1343.

15. *Id.* at 1343-44 (this section of the opinion discusses both supporting and contrary cases in other jurisdictions).

16. *Id.*

17. *Id.* at 1344. This decision was vacated on other grounds by the Indiana Supreme Court in *Blackburn v. Sweeney*, 659 N.E.2d 131 (Ind. 1995), but the court expressly reserved judgment on whether the agreement violated Rule 5.6. *See infra* note 19.

In addition, the court compared this action to an anti-trust violation.¹⁸ The court reviewed cases in other business settings in which the parties agreed to limit advertising. In those cases, the courts concluded that such agreements were an impermissible restraint of trade, because limiting advertising was “inherently likely to produce anti-competitive effects.”¹⁹ This Note will not discuss this part of the decision at any length.

Was the *Blackburn* decision sound? This Note will deal with different aspects of this question. Part I will review the general validity of non-competition contracts in the law. Part II will compare the law’s treatment of non-competition contracts generally with its approach concerning lawyers. Part III will address three issues. Subpart A will ask whether Rule 5.6, which prohibits agreements placing restrictions on the practice of law, really serves the public interest, or merely serves lawyers. Subpart B will discuss whether the legal community should retain the rule against restrictive covenants. Subpart C proposes a different outcome for cases like *Blackburn*, and considers a change to MRPC Rule 5.6.

I. GENERAL CONSIDERATIONS ABOUT NON-COMPETITION CONTRACTS

As a general rule, courts uphold non-competition covenants in other professions, as long as the covenants impose reasonable limitations.²⁰ In many

18. *Blackburn*, 637 N.E.2d at 1343.

19. *Id.* at 1343 (quoting *In re* Massachusetts Bd. of Registration on Optometry, 110 F.T.C. 549, 605 (F.T.C. 1988)). This decision was taken collaterally to federal court in *Blackburn v. Sweeney*, 850 F. Supp. 758 (N.D. Ind. 1994), on the anti-trust issue, where the district court held that there was no per se violation, but that there might be a violation under the rule of reason. On appeal, the Seventh Circuit held that there was a per se violation due to horizontal restraint of trade, or an agreement between equal competitors in a certain market, and invalidated the agreement. *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995). It was on this basis that the Indiana Supreme Court, using the doctrine of comity, invalidated the agreement and reserved the Rule 5.6 issue for another day. *See supra* note 17. This author believes that the district court has the better-reasoned approach, because in no way did the parties have a significant share in the relevant market. *Blackburn*, 850 F. Supp. at 764. This argument is related to the discussion about whether the public is really disserved by a non-competition agreement due to the relative abundance of personal injury attorneys. *See infra* notes 78-92 and accompanying text. However, at least three judges on the Seventh Circuit disagree with this viewpoint, instead looking to the relative percentage of their own markets which were allocated, as opposed to looking at the percentage of the whole market. *Blackburn*, 53 F.3d at 828.

20. 54 AM. JUR. 2D *Monopolies* § 543 (1971) [hereinafter *Monopolies*] (and cases cited therein); 17 C.J.S. *Contracts* §§ 238, 246, 254 (1963) [hereinafter *Contracts*] (and cases cited therein); RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981) (and cases cited therein). *See also* *Standard Oil Co. v. United States*, 221 U.S. 1, 51-58 (1911); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960) (discussing the historical common-law development of post-employment restraints); Jill M. Mayo, Comment, *The Antitrust Ramifications of Noncompetition Clauses in the Partnership and Employment Agreements of Doctors*, 30 LOY. L. REV. 307, 308-14 (1984).

employment situations, employers require employees to sign non-competition clauses as a condition of their employment contract. This happens more frequently in situations where the employee may acquire certain specialized skills from the employer, or where the employee may become privy to important business contacts or trade secrets.²¹

In these circumstances, non-competition provisions protect the employer's interest in the business he has built by preventing departing employees from using the training or knowledge gained from the employer to either start their own business or to work for a competitor. Conversely, the reasonableness limitation protects the employee's interest in working by limiting the restriction on his or her ability to work. The reasonableness requirement also protects the public's interest in having access to the services of the former employee.

An analysis of non-competition covenants and the reasonableness requirement will lay a foundation of the general rules regarding non-competition contracts. By setting out the basic structure of analysis, this discussion will demonstrate how lawyers' non-competition covenants could also fit into this doctrine, obviating the need for a strict provision such as MRPC Rule 5.6.²²

A. *Non-Compete Agreement Usually Valid*

In *Ruhl v. F. A. Bartlett Tree Expert Company*,²³ a Maryland court enforced a non-competes contract that placed restrictions on an employee of a tree-trimming company who had acquired some training and customer contacts from his employment. This restriction covered only a six county region (the area in which the employee had worked as area manager) for a period of two years.²⁴ The court found that even though the employee's only training was in the field of tree-trimming, the restrictions were reasonable, and justified an injunction against the employee to prevent him from operating his own business.²⁵ This decision balanced employer and employee interests.

In another Maryland case, *Millward v. Gerstung International Sport Education, Inc.*,²⁶ the employee already had name recognition in the community. However, he had developed many contacts essential to the business by working

21. Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (referring to the increased appearance of non-competition covenants in highly technological business settings).

22. MRPC Rule 5.6 states in relevant part, "A lawyer shall not participate in offering or making . . . a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . ." MRPC Rule 5.6 (1983).

23. 225 A.2d 288 (Md. 1967).

24. *Id.* at 290.

25. *Id.* at 291-94.

26. 302 A.2d 14 (Md. 1973).

for the company.²⁷ His contract restricted his employment for two years after leaving, and covered only the city of Baltimore and its surrounding counties.²⁸ When he left, he used these contacts to compete with his former employer, and the court held the non-competition contract enforceable because it protected a valid employer interest in those contacts, and because it had specific reasonable limitations.²⁹

Non-competition contracts have been upheld against professionals as well. In one California case, *Swenson v. File*, the court validated portions of a non-competition agreement in an accounting firm which stayed within proper, or reasonable, parameters.³⁰ In many cases, such contracts have been upheld against accountants.³¹ Courts generally recognize that although the clients have an interest in the services of the accountant of their choice, as long as the contract limitations are reasonable, no undue damage occurs to justify invalidation of the contract.³²

Of particular interest, in a professional context, are non-competition covenants in the medical field. Doctors parallel lawyers in some areas crucial to considering the wisdom of enforcing non-competition contracts against them. First, doctors, like lawyers, perform services vital to the functioning of modern society. In fact, in this regard, people generally use a doctor's services more often than a lawyer's. Although neither the American Medical Association nor the American Bar Association has conducted surveys on nation-wide use of their respective professions' services, common-sense suggests that more people see doctors than see lawyers in their professional capacities. Every person is subject to illness or accident, while not everyone is automatically subject to legal action and indeed many people rarely, if ever, consult a lawyer. Accordingly, it would better serve the public, in preserving access to an essential service, to prohibit non-competition contracts between doctors than it would to prohibit lawyers from entering non-competition contracts. Nevertheless, it is common practice for doctors to enter into these agreements and for courts to uphold them.³³

27. *Id.* at 17.

28. *Id.* at 15.

29. *Id.* at 17.

30. 475 P.2d 852, 857-58 (Cal. 1970).

31. See Annotation, *Enforceability of Covenant Against Competition in Accountant's Employment Contract*, 15 A.L.R. 4th 559 (1982) (discussing a number of cases that have enforced or refused to enforce non-competition contracts against accountants). These covenants are also fairly prevalent in highly technological settings. See Closius & Schaffer, *supra* note 21, at 532 n.2 (giving a number of sources to support this proposition). The rationale is the same, but the employer's interest in protecting knowledge gained by the employee is even more important, because knowledge is often the essence of a technologically-based business. See also *Monopolies*, *supra* note 20, §§ 554-64 (discussing several other areas of employment in which reasonable restrictive covenants have been upheld, including dentists, income tax specialists, managerial staff, a soil engineer, salesmen, and other skilled employees).

32. See, e.g., *Smith, Batchelder & Rugg v. Foster*, 406 A.2d 1310, 1312 (N.H. 1979) (discussing this factor as the third prong of the reasonableness test).

33. *Getty*, *supra* note 1, at 235. See also *Canfield v. Spear*, 254 N.E.2d 433 (Ill. 1969); *Hall*

A second and important factor in upholding physician non-competition contracts is the need to protect the employer's interest in keeping his patients.³⁴ Although it would seem detrimental to deny the patient access to a doctor who has familiarity with his medical history, that factor is rarely considered in the decisions.³⁵ Apparently, as long as the doctor is allowed to serve some sector of the public interest, a specific patient's interest in consistent medical care is not a factor. At least one court has found that if the contract is reasonably limited, so as to allow the doctor to practice in some other capacity or area, then the public interest is served.³⁶ Thus, the employer's interest in keeping his patients outweighs the specific patient's interest in keeping his doctor, as long as the general public interest is not harmed.

Third, as long as a contract falls within the court's determination of reasonableness, then the employee/doctor's interest in work will also be protected to a certain degree. Because these non-competition contracts cannot generally be unlimited as to time, place, or area of practice, the doctor retains the opportunity to work in his chosen profession, if not in the exact location or practice which he would prefer.

However, the cases regarding lawyers seem to turn this reasoning on its head. In the physician examples, the business' interest is protected to a limited extent.³⁷ However, in the lawyer cases, the employer's business interest is subordinated to the public interest in the lawyer's services, the prior clients' interest in having the same lawyer handle his legal matters, and the lawyer's right to practice law unrestrained. This Note will examine these policies in detail later.³⁸

B. Defining Reasonableness

It is well established that non-competition agreements in the employment context are valid as long as they are reasonable.³⁹ There are several factors on which courts base such decisions: the employer's business interests, the employee's right to work, and the public interest in the service.⁴⁰ Additionally, most courts seek to place some limit on the duration, geographical area, and scope

v. Willard & Woolsey, P.S.C., 471 S.W.2d 316 (Ky. Ct. App. 1971); *Ellis v. McDaniel*, 596 P.2d 222 (Nev. 1979) (non-competition contracts between doctors at least partially valid); *Geocaris v. Surgical Consultants*, 302 N.W.2d 76 (Wis. Ct. App. 1981) (non-competition covenant held invalid because unreasonable).

34. *Mayo*, *supra* note 20, at 307 nn.1-2.

35. *But see Gomez v. Chua Medical Corp.*, 510 N.E.2d 191, 196-98 (Ind. Ct. App. 1987) (Sullivan, J., concurring, joined by Garrard, J.). This decision criticizes non-competition covenants between physicians as a denial of essential services to the public, thus disserving the public interest.

36. *Canfield*, 254 N.E.2d at 435.

37. *Mayo*, *supra* note 20, at 307 & nn.1-2.

38. *See infra* notes 77-94 and accompanying text.

39. *Contracts*, *supra* note 20, §§ 240, 241(1), 246.

40. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmts. a-c (1981); *Monopolies*, *supra* note 20, §§ 544-49; *Contracts*, *supra* note 20, §§ 246-47.

of activity restraints that many non-competition contracts contain.⁴¹ Finally, many courts hold that these agreements may be no more restrictive than necessary to protect the employer's interest.⁴²

The common-law reasonableness approach has the strengths and weaknesses inherent in the application of a rule of reason in any context. It provides flexibility to accommodate the factually sensitive nature of these issues and allows judges to fit the judgment to concerns of justice and equity.⁴³ However, this also means that very few decisions are certain and it may be difficult for litigants to know their rights in advance, or to determine when to settle.

The reasonableness requirement, although maligned by some,⁴⁴ still dominates courts' discussions of non-competition contracts.⁴⁵ Reasonableness as a requirement seeks to balance all relevant interests in the ability or inability of the employee to work.⁴⁶ This approach attempts to avoid any undue inequities while upholding both parties' rights to freedom of contract.⁴⁷

This limitation has served a valuable purpose, and seems to have worked. Using the medical field as an example, there is no apparent dearth of doctors today, except in some rural areas, and this lack is not due to the use of restrictive covenants in those areas.⁴⁸ No mass revolution has broken out over patients having to switch doctors when their doctor leaves. Doctors are still considered among the top wage-earners in our society, even if they are sometimes forced to work in another area. Finally, in practical effect, this enables employers to protect

41. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d (1981); *Monopolies*, *supra* note 20, § 544-49; *Contracts*, *supra* note 20, § 247.

42. *See* *Laconia Clinic, Inc. v. Cullen*, 408 A.2d 412 (N.H. 1979); *Contractual Restrictions on Right of Medical Practitioner*, *supra* note 1, at 1039-40.

43. *Koger Properties, Inc. v. Adams-Cates Company*, 274 S.E.2d 329 (Ga. 1981) (holding a non-competition covenant that contained an indefinite area clause invalid as vague and unreasonable). *But see* *Hunter v. North American Biologicals*, 287 So. 2d 726 (Fla. Dist. Ct. App. 1974) (holding a non-competition covenant valid that contained an unspecified, and therefore unlimited, area clause).

44. *See* *Getty*, *supra* note 1, at 237 (an example of one author who criticizes the reasonableness approach).

45. *Contracts*, *supra* note 20, §§ 240, 241(1), 246.

46. *See, e.g., Ellis v. McDaniel*, 596 P.2d 222, 224 (Nev. 1979); *Hansen v. Edwards*, 426 P.2d 792 (Nev. 1967).

47. *Ellis*, 596 P.2d at 224.

48. Many newspapers and magazines document the lack of medical services in rural or inner-city areas. In the many articles this author has surveyed, none mention restrictive covenants as a factor. Instead, most blame economic or systemic failures, or burn-out due to workload. *See, e.g.,* Dan Hurley, *Med Students Put Price on Primary-Care Career*, CHI. SUN-TIMES, Mar. 23, 1994, at 56; W. Henson Moore, *Health Care: Struggling With the Thorny Issues*, WASH. POST, Aug. 18, 1994, at A20; Donald E. Pathman et al., *Medical Education and the Retention of Rural Physicians*, HEALTH SERVICES RES., Apr. 1994, at 39; Richard Wolf, *In South Dakota, Problem is Plain - Too Few Doctors: State Typifies the Problems of Medical Care in Rural Areas*, USA TODAY, Feb. 18, 1994, at 7A.

their client base to some extent.⁴⁹

The reasonableness test could serve the same functions in the legal context. It could take into account all relevant interests, weigh them accordingly, and protect the public by putting some limitations on the extent of the contract.

II. NON-COMPETITION AGREEMENTS AMONG LAWYERS

The validity of non-competition agreements, as upheld if reasonably limited,⁵⁰ does not apply to the same types of agreements among lawyers today.⁵¹ Lawyers are often held to what almost amounts to a per se rule prohibiting non-competition contracts.⁵²

In one case, the law firm and stockholders (members of the firm) entered into an agreement which would pay deferred compensation to shareholder-attorneys that left the firm unless they continued to practice law.⁵³ The court held that, "[t]he financial disincentive in leaving [a firm] . . . to practice law elsewhere works an impermissible restriction under DR 2-108."⁵⁴

In an Oregon case, *Hagen v. O'Connell, Goyak & Ball, P.C.*, the attorney-plaintiff was a shareholder in the legal corporation.⁵⁵ The corporation had a buy-sell valuation agreement which stipulated that any departing shareholder who failed to sign a non-competition agreement must sell his stock to the remaining shareholders with a 40% reduction in the price.⁵⁶ The court found that this provision worked to restrict the withdrawing partner's practice of law by creating a financial barrier, and was void as against the public policy that legal counsel must be available as the client desires.⁵⁷

In *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*,⁵⁸ the Iowa Supreme Court went a step further. There, the agreement did not even mention a non-competition clause, but merely provided that if "the withdrawing partner 'committed an act which is detrimental to the partnership which affects the value of the remaining partners' interest in the partnership,'" then the remaining partners could substantially reduce the buy-out price of his interest.⁵⁹ The partners determined that the departing lawyer injured those remaining by leaving a lucrative area of the firm and taking a majority of the clients with him, and then

49. See Mayo, *supra* note 20, at 307 & nn.1-2.

50. See *supra* Part I.

51. See MRPC Rule 5.6 (1983); MCPR DR 2-108 (1980).

52. MRPC Rule 5.6; MCPR DR 2-108. Note that although these are generally blanket provisions, there is an exception with regard to conditions on retiring lawyers receiving pension compensation, which the rule allows.

53. Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528 (Tenn. 1991).

54. *Id.* at 531 (DR 2-108 is the MCPR provision prohibiting restrictive covenants).

55. 683 P.2d 563 (Or. Ct. App. 1984).

56. *Id.* at 564.

57. *Id.* at 565.

58. 461 N.W.2d 598 (Iowa 1990).

59. *Id.* at 599.

sought to enforce the clause in the partnership agreement.⁶⁰ The court held that this constituted, in effect, a restriction on the practice of law and thus violated the rules of professional responsibility, even though the agreement made no express provision conditioning payment on entering into a non-competition contract,⁶¹ as was the case in *Hagen* above.⁶²

In *Blackburn v. Sweeney*,⁶³ the Indiana Court of Appeals based its decision on two grounds. First, it found that the cases mentioned above closely paralleled the case sub judice.⁶⁴ Although the cases the court analyzed dealt with financial penalties or disincentives, the court analogized those cases to the case at hand which limited advertising. In ruling under MRPC Rule 5.6 (the provision prohibiting restrictive covenants), Judge Staton wrote, “[w]e believe the provision at issue here poses a similar risk of abuse. A nonadvertisement agreement indirectly, but effectively, limits the pool of attorneys from which potential clients may choose.”⁶⁵

The court also examined a second line of cases that dealt with agreements which restricted advertising in other business settings. Under this analysis, the court noted an alternative reason to support invalidating the contract: that of an impermissible restraint of trade closely akin to an anti-trust violation.⁶⁶ However, this Note will not discuss that issue in any detail.

III. CRITIQUES AND PROPOSALS

This Part will criticize the *Blackburn* decision on two grounds. First, the court in *Blackburn* applied MRPC Rule 5.6 in a narrow and formalistic manner and did not allow for flexible decision-making based on modern-day considerations. Second, on a broader scope, this Part will criticize the rule of professional conduct on which the decision is based. Not only is the rule often too narrowly construed by courts, but the rule itself exempts lawyers from the common-law rules that other segments of society are forced to obey. This rule is self-serving and its underlying attitude engenders vehement anti-lawyer sentiment from the public. Finally, this Part will propose a solution for the problem. This solution could either take the form of a reconstructed rule, or return to the common-law rules used in other settings.

60. *Id.* at 600.

61. *Id.* at 601-02.

62. *Hagen v. O'Connell, Goyak & Ball, P.C.*, 683 P.2d 563, 565 (Or. Ct. App. 1984).

63. 637 N.E.2d 1340 (Ind. Ct. App. 1994). *See supra* notes 4-19 and accompanying text for a summary of the relevant facts.

64. 637 N.E.2d at 1343-44.

65. *Id.* Note that, although the Indiana court ruled under the *Indiana* Rules of Professional Conduct, Indiana's Rule 5.6 is identical to the MRPC Rule 5.6. This Note refers to it as the Model Rule in order to avoid confusion.

66. *Id.* at 1343. *See supra* note 19 for a brief discussion of the anti-trust issue.

A. *Blackburn v. Sweeney: Decision Under MRPC Rule 5.6*

Assuming arguendo that the rule applied by the court in *Blackburn* is good policy, the court should not have construed it so strictly. Some courts have approached the problem from a more flexible standpoint. One example is the California Supreme Court decision in *Howard v. Babcock*.⁶⁷ In that case, the partners had signed a partnership agreement that forced withdrawing partners, who subsequently worked in competition with the firm in liability insurance defense within a certain area, to forego some portion of their withdrawal benefits.⁶⁸ The amount forfeited depended upon the particular area in which the departing partners worked and on how many partners left to form a practice together.⁶⁹

The court held "that an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm is enforceable."⁷⁰ Although the court remanded the case to the trial court to determine if the particular agreement was reasonable, it recognized that some agreements could be limited enough in scope so as not to unduly restrict the practice of law.⁷¹ In this way the court used a flexible interpretation of the word "restrict" to weigh all relevant interests and to arrive at an equitable solution.

Conversely, the court in *Blackburn* found that the activity of limiting advertising did unduly restrict the practice of law and read the rule strictly, almost as a *per se* standard.⁷² It is debatable from a practical standpoint whether this provision truly restrained the practice of law. The court called it an indirect but effective restriction.⁷³ The provision did not prevent the lawyers from representing clients from the designated "no-advertising" areas, so clearly it did not directly restrain the lawyer's ability to practice. What then did it restrain?

It could be that by limiting the potential clients who might consult the lawyer, the lawyer is restrained from representing clients in the restricted area. Because those clients would effectively be prevented from finding the lawyer, he could not represent them. This view would hold that although the clause does not expressly prohibit representation, it indirectly does so. The Comment to MRPC Rule 5.6 states that a non-competition covenant "limits [the lawyer's] . . . professional autonomy."⁷⁴ This argument seems attenuated and should not be extended.

If a lawyer signs a non-competition covenant barring practice in New York while he practices in California, technically it is a restriction on the practice of law. But does it really restrict anything if that lawyer never works or intends to work in New York? By the same token, if a lawyer in South Bend, Indiana, is prohibited from advertising in Jasper, Indiana, does it really restrict his practice if

67. 863 P.2d 150 (Cal. 1993).

68. *Id.* at 151.

69. *Id.*

70. *Id.*

71. *Id.* at 156.

72. *Blackburn v. Sweeney*, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994).

73. *Id.* at 1344.

74. MRPC Rule 5.6 cmt. (1983).

he normally conducts no business in Jasper? While these hypotheticals are ridiculous from a practical view, they point out that just because a provision prohibits a certain activity, it does not necessarily restrict a lawyer's practice. For example, in *Blackburn*, the attorneys retained different offices after the split, thus minimizing the possibility that they would serve any significant number of clients from the others' areas.⁷⁵

In *Blackburn*, one provision of the dissolution agreement held that one set of lawyers would essentially take over the practice in one area while the other set would operate the offices in another area.⁷⁶ Because the firm had offices in different areas, it would seem natural to divide the partnership in this way. Sweeney, in operating an office in one area, likely would not have served many clients in the other area anyway. Therefore, this limitation probably did not impinge in any meaningful sense either party's practice of law. Further, the court did not even consider the argument that this agreement somehow restricted the lawyer's right to practice. In looking beyond the comment to MRPC Rule 5.6, the court essentially said that the only true policy for this rule was to insure the public's access to legal services.⁷⁷

The next contention is that the agreement possibly restrained the general public who resided in the area subject to the advertising ban from knowing about, and consequently hiring, the prohibited group.⁷⁸ MRPC Rule 5.6, in its comment on this point, states that a restrictive agreement "limits the freedom of clients to choose a lawyer."⁷⁹ This could be seen as an injury to the public interest in having ready access to legal counsel in general, or to the particular lawyer of their choice.

The public's general interest in having ready access to legal counsel, and the effect that advertising has on that interest, has been discussed at great length in another context. In *Bates v. State Bar of Arizona*,⁸⁰ the Supreme Court of the United States had much to say about the detrimental effects of a ban on advertising legal services or representation. In this case, the Court dealt with an Arizona Supreme Court rule (adopting MCPR DR 2-108) that constituted essentially a blanket prohibition of advertising by lawyers.⁸¹ Two lawyers advertised the general types of law that they practiced and the average fees they charged for certain standardized services.⁸² The state bar association brought a disciplinary

75. *Blackburn*, 637 N.E.2d at 1341.

76. *Id.* Although this is never expressly mentioned, it is reasonably inferred from the division of the advertising area, the fact that Blackburn had originally operated the Ft. Wayne and Lafayette offices while Sweeney operated the South Bend office, and the testimony from Sweeney at trial to the effect that in a practical sense the practice had been divided along those lines beforehand. *Id.* at 1341-42, 44.

77. *Id.* at 1343 (citing *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 146 (N.J. 1992)).

78. *Id.*

79. MRPC Rule 5.6 cmt. (1983).

80. 433 U.S. 350 (1977).

81. *Id.* at 355.

82. *Id.* at 354, 385.

action against both attorneys for violating the rule.⁸³

The Court found that when services are not generally advertised in a truthful fashion, especially in a field of service where the average consumer is likely to have little experience or knowledge, the public may be effectively denied access to those services.⁸⁴ This point was well-taken, particularly in light of the fact that the public at the time of the decision was generally unaware of the availability of or prices charged for legal representation.⁸⁵

However, that does not appear to be the problem today, especially in personal injury law, where advertising seems to have risen to an all-time high. The problem regarding the lack of advertising in the field in which both Sweeney and Blackburn practiced simply does not exist today. One need only turn on the television to a local station or open the Yellow Pages to see the truth of this statement. The Court would not, by enforcing this agreement, deny the public knowledge of the accessibility and general affordability of legal services. Another possible concern of the Court could have been that the public would be deprived of the services of a particular lawyer or lawyers. This draws some interesting parallels to the way some courts have addressed the issue of the practice of medicine.

In one case involving medical practitioners, a Nevada court faced a situation where a doctor practiced orthopedic surgery in a rural area.⁸⁶ He had formerly practiced with a group of doctors, no other member of which was an orthopedic specialist.⁸⁷ When he sought to leave the group and practice in the immediate area, the other doctors sought to enforce the non-competition agreement against him.⁸⁸ The court held that because no other doctor practiced orthopedic medicine, the clause was too restrictive and the clinic had no genuinely protectible interest in those services.⁸⁹ Second, and more germane to this discussion, the court found that patients needing the services of an orthopedic specialist would have to travel great distances to receive these services if the court enforced the non-competition

83. *Id.* at 356.

84. *Id.* at 370.

85. *Id.* at 370 & n.22. The policies implied by the Court closely parallel the policies as proposed by the Comment to MRPC Rule 5.6. The primary policies behind allowing attorney advertising are: 1) to allow attorneys the chance to truthfully advertise their services under the Commercial Speech Doctrine and the First Amendment, and 2) to promote wider access to legal services for the public. *Id.* at 363-64. The policies for MRPC Rule 5.6 are: 1) that the lawyer be allowed to practice law as he or she desires, and 2) that the public have access to the lawyer of their choice. MRPC Rule 5.6 cmt. Much could be said about the intersecting of these two policies, but that is beyond the scope of this Note. It is worth noting that the comments to MRPC Rule 7.2, which the ABA promulgated after the *Bates* decision, focus on the accessibility of legal services to the general public but ignore the right to freely practice law. MRPC Rule 7.2 cmt. [1].

86. *Ellis v. McDaniel*, 596 P.2d 222, 223 (Nev. 1979).

87. *Id.* at 224.

88. *Id.* at 223.

89. *Id.* at 224.

covenant.⁹⁰ Thus, the public interest in a specialized service outweighed the clinic's interest in protecting its business.⁹¹

In contrast, in an area as populated as those in which both Blackburn and Sweeney practiced, there was no lack of personal injury lawyers.⁹² If these two lawyers had been the only practitioners of this type of law in the immediate area and the residents were in need of such services, it would be a different situation. But such was not the case, and it would be unreasonable to argue that the public had a specific interest in the services that these lawyers provided.

Another argument is that the long-term clients of one of these lawyers would have an interest in retaining his or her services. However, as pointed out earlier, there was no provision in the agreement limiting who could be represented, just a provision that geographically restrained advertisement. Therefore, long-term clients who wished to retain a certain lawyer for reasons of stability and confidence in that lawyer's ability and in their relationship may have done so.⁹³

Furthermore, although continued representation is an important right for loyal clients of a lawyer, having to find a new attorney would not necessarily mean disaster. While a new lawyer would be unfamiliar with the client generally and the case specifically, as long as there were other lawyers who competently practiced in the areas in which the client needed legal counsel, the client could still receive adequate representation. The example of doctors discussed above shows this well. It would seem as important, if not more so, to a medical "client" to have consistent medical care, especially in cases of prolonged conditions or sensitive medical problems, as it would for a legal client to have consistent legal representation.

However, in the situation of a doctor, as in *Ellis*, if there is no specific need for his specialty, then clients are not unduly injured by the removal of his services. This facet of non-competition agreements fits into the previous discussion on the public interest in the specialized skills of the lawyer at issue. As long as potential clients can receive adequate legal representation, then their right is not sufficiently injured to warrant the invalidation of a contract entered into freely.⁹⁴

90. *Id.* at 225.

91. *Id.*

92. In general there is not a lack of lawyers today. In a recent study, the ratio of general population to lawyers has gone from 790 to 1 in 1947-48, to 320 to 1 in 1990-91. The raw number of lawyers for the same two periods of time are 169,489 and 777,119, respectively. *Legal Education and Professional Development - An Educational Continuum*, 1992 A.B.A. SEC. OF LEG. ED. AND ADMISSIONS TO THE BAR 14-15.

93. See the Conclusion of this Note discussing how, in working out a new rule on lawyer post-employment restraint contracts, any rule should take into account the interests of any particular client who, for whatever reason of confidentiality or preference, would desire to retain that lawyer's service. This should be a central concern and limitation on the enforceability or reasonableness of non-competition covenants.

94. See *Ellis*, 596 P.2d at 224 (although the public has an interest in promoting competition, "it also has an interest in protecting the freedom of persons to contract, and enforcing contractual rights and obligations").

*B. Should The Legal Profession Retain the Rule Against
Lawyers' Restrictive Covenants?*

Having considered how courts generally apply MRPC Rule 5.6, or its counterpart MCPR DR 2-108, the next question is whether this rule is warranted or serves the purposes that have been presented for its adoption.

Is the rule against restrictive agreements one that rests on sound public policy considerations? The two major policies behind MRPC Rule 5.6, as announced in the comments thereto, were the rights of lawyers to practice and the right of the public to have free access to legal counsel of their choice. There are many problems inherent in the right to legal services rationale advanced by the rule.⁹⁵

It is hard to construct a convincing argument that restrictive agreements in fact cause irreparable harm to the public interest. Of course, courts should not diminish the right of the public to have access to legal services, because this is essential to uphold justice for the average citizen. Equally compelling, and perhaps the best rationale for the rule, is the aversion to treating clients like property.⁹⁶ At no time should the legal community slip into a mentality that treats clients in the same way divorcing spouses treat the house, car, boat or family pet. However, the causal link between allowing reasonable restrictive agreements, accounting for the public's interest in the lawyer's specific services, and the downfall of the legal system is not tenable.

Assuming that non-competition contracts injure the public good by denying essential services to the people, then we should do away with these contracts for all essential service providers. There should be some consistency in the law and the enunciated policies behind precedents that, although decided in substantially similar circumstances, come to radically different conclusions.⁹⁷ However, because there is no demonstrated injury to the public welfare by enforcing these covenants against other important service providers, it is hard to understand how enforcing them against lawyers would injure the public.

Conversely, non-competition covenants may even serve clients' interests. As the court in *Howard* noted, "Law firms have an affirmative obligation to the client to provide an atmosphere most conducive to the development of the attorney-client relationship and to the efficient, diligent completion of work."⁹⁸ Allowing lawyers

95. See *supra* notes 78-94 and accompanying text for a discussion of these problems.

96. See *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 601 (Iowa 1990).

97. See *Canfield v. Spear*, 254 N.E.2d 433 (Ill. 1969) (upholding a restrictive covenant against a doctor). *But see* *Blackburn v. Sweeney*, 637 N.E.2d 1340 (Ind. Ct. App. 1994), *trans. denied*, 659 N.E.2d 131 (Ind. 1995) (striking down a restrictive covenant against a lawyer based on a strict public policy prohibiting such covenants).

98. *Howard v. Babcock*, 863 P.2d 150, 159-60 (Cal. 1993) (quoting Kirstan Penasack, Note, *Abandoning the Per Se Rule Against Law Firm Agreements Anticipating Competition: Comment on Haight, Brown & Bonesteel v. Superior Court of Los Angeles County*, 5 GEO. J. LEGAL ETHICS 889, 890-91 (1992)).

to leave at will can disrupt the prompt attention clients deserve, or can make firms unwilling to invest money in areas of practice if partners are likely to move laterally to another firm and substantially undercut the prior firm's business in that area.⁹⁹ If the law would promote a stable environment within a firm, a client may avoid potential dilatory action on the part of the firm when the lawyer handling their matter leaves to practice elsewhere.

Concerning a lawyer's right to freely practice law, why should lawyers have a right that other learned professionals do not? This kind of rule seems to serve only the legal profession. Although there is an argument that it only protects those who want to leave and not the firm that hired them, thus not protecting all lawyers, this rationale alone does not account for the moral or ethical impact of such a rule. Such a rule says to the profession as a whole, "You are an elite group of learned scholars who are above the law that others must follow because of your position in society." This is exactly the reverse of the attitude that the profession ought to have.

Because lawyers have such an impact on achieving justice for the average citizen who might not otherwise have meaningful resort to a court of law in resolving a dispute, the rules for lawyers should be construed so as to substantially protect citizens. Lawyers should not be exempt from the very law they seek to enforce. People may tend to distrust lawyers if the average citizen perceives that lawyers are above the law. Although the current rule is couched in phrases that promote protecting the right of the citizen to legal services, in effect it does not do so. The proponents of this rule can point to no evidence that it actually accomplishes the goal of maintaining access to legal services. They can only point to theory. Instead, the rule is one which allows a lawyer to leave a firm at his own discretion and damage the interest of his employer at will.¹⁰⁰ In this situation, in accordance with *Blackburn* and *Jacob*, it seems as though the truly compelling rationale for the rule is the protection of the public (clients).

Another consideration is polishing the tarnished image that lawyers have in society today. Although the general public is probably not aware of the specific prohibition against non-competition covenants and how this exempts lawyers from agreements to which others are usually held, this kind of rule encourages an attitude of superiority and a kind of legal hubris. While the problem runs much deeper than this single rule, this is, in a sense, a symptom of the problem. The profession as a whole needs to re-examine the structure of its mores and ethical

99. *Id.*

100. It should be noted that there is some check on the departing lawyer's freedom to injure his employer when he leaves. Although clients are generally free to leave the firm to continue receiving representation from the lawyer, in many instances the lawyer is not free to write letters or in other ways directly solicit the clients to draw them away from the firm. See *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978) (limiting the departing lawyer's ability to steal clients from the firm by restraining him from writing solicitation letters to former clients); Opinion 80-97 (1980), summarized in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 801:2303 (allowing a non-compete clause which prohibits direct solicitation of former clients); MCPR DR 2-103(A).

code and begin to question the validity of rules such as this one.

The consideration of enhancing the legal profession's image presents an interesting juxtaposition to the *Bates* decision. In *Bates*, the Court supported the idea that lack of advertising breeds disillusionment among the public because they perceive "the profession's failure to reach out and serve the community."¹⁰¹ However, allowing lawyers to advertise freely under the facts of *Blackburn* would allow an exemption that, while not common knowledge to the man on the street, puts the legal profession on a pedestal and fosters the same kind of elitist attitude that the Court deplored in *Bates*. This could be resolved through some type of compromise.¹⁰²

One principle found in many areas of the law is that those who are well-informed as to the consequences of their actions are in a better position to assume the risk inherent in those acts. This principle then leads to a paradox. Today the law upholds non-competition covenants against all types of employees, from tree-trimmers to doctors, accountants to computer technologists. However, the one group exempt from these contracts is the legal community, which is in the best position to know the ramifications of signing a contract and to understand legal terminology.¹⁰³ This result is at best counter-intuitive and at worst self-serving and arrogant.

C. Proposals for Change

First, it would not mean the destruction of civilization as we know it if we simply did away with the rule. At least one state has already done so, although it has been too recent to see any appreciable effects of the change.¹⁰⁴

Second, and possibly in addition to the first proposal, the courts could repeal the rule and return to the common-law scheme of using reasonableness as the benchmark.¹⁰⁵ This would subject lawyers to the same rules as all other professions and avoid the kind of hostile scrutiny that the profession has too often received. This would also help generate feelings among the legal community that, even though the profession has a long and honorable history, this fact should not create an exemption from the rules imposed on the rest of society. Rather, lawyers' elevated position means that they should be subject to a higher standard

101. *Bates v. State Bar of Arizona*, 433 U.S. 350, 370 (1977).

102. See *infra* notes 104-11 and accompanying text discussing options for a suitable compromise.

103. See *Canfield v. Spear*, 254 N.E.2d 433 (Ill. 1969). "When the agreement was signed the defendant, a professional man some 30 years of age and holding degrees from a university was hardly incompetent to look out for his own interests. . . . He has accepted the benefits of the contract and must take the burdens as well." *Id.* at 434-35.

104. Opinion 92-126 (1992), summarized in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 1001:4203 (stating Maine's decision not to adopt this rule).

105. See Glenn S. Draper, Comment, *Enforcing Lawyers' Covenants Not To Compete*, 69 WASH. L. REV. 161, 180-81 (1994); Penasack, *supra* note 98, at 909-12. Both articles support the use of the reasonableness standard in lawyers' non-competition covenants.

of ethical behavior.

There is an argument that it would be unethical to allow lawyers to limit their access to the public realm. There are two points involved here. First, this contention assumes that such contracts will become prevalent enough to have some sort of impact. The further assumption is that firms will be able to dictate that all new associates sign these or risk not being hired. This is purely conjectural. Second, even if the first point is valid, the assumption is that these agreements will have a deleterious effect on the public. In reality, non-competition contracts have not injured the public in other professions and it seems unlikely that allowing reasonable agreements among lawyers would have any ill effects on the average citizen.¹⁰⁶

Another approach would be to imitate the California courts' use of the rule. In *Howard*, the court construed the term "restriction" using a flexible approach, recognizing that not every limiting provision in a post-employment non-competition contract substantially restricts the practice of law.¹⁰⁷ Using a broader interpretation, courts could achieve more equitable results by using common-sense notions of what truly restricts a lawyer's practice without blindly prohibiting these covenants.

Third, the ABA or other governing bodies could revise the rule to allow more discretion in drafting and upholding these agreements. To draft a new rule, let us first look at the present one and then draw possible comparisons. MRPC Rule 5.6 states in relevant part: "A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the right of a lawyer to practice after the termination of the relationship, except an agreement concerning benefits upon retirement"¹⁰⁸

As with any code or statutory provision, there are a number of ways to change the meaning of the text, either by slight addition or subtraction of a word, or by total revision. One possible way of redrafting this code provision would be to insert the word "substantially" before "restricts."¹⁰⁹ The drafters could explain in a comment that this addition means that agreements which are not substantial restrictions would be allowed. They could add several "substantial" factors, including the public's interest in that particular lawyer's services, his long-term clients' interest in stability of legal representation, the employer's protectible interest, and the employee's interest in working. Examples of allowable provisions could be agreements not to directly solicit the specific clients of the firm, or prohibitions on informing clients, in a letter telling them of the lawyer's withdrawal, of the reasons for the lawyer's departure.¹¹⁰ These provisions parallel,

106. See *supra* notes 84-94 and accompanying text.

107. *Howard v. Babcock*, 863 P.2d 150, 156 (Cal. 1993) (stating that these agreements do not restrict the practice of law but attach economic consequences to a lawyer's choice to compete).

108. MRPC Rule 5.6 (1983).

109. Cf. LAWYER'S CODE OF CONDUCT Rule 8.13 (1982) (the comparable provision of the American Trial Lawyers Association's alternative code that uses the language "unreasonably restricts").

110. Opinion 80-97 (1980), summarized in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL

in restrictiveness, agreements not to advertise within definite and limited areas.

Another possible way to redraft this rule would be to leave "substantially" in as above, but then to reconstruct 5.6 (a) as follows:

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that substantially restricts the right of a lawyer to practice after termination of the relationship, except:

(1) an agreement concerning benefits upon retirement; or

(2) an agreement which would restrict clients that the lawyer has already served from continuing his or her representation; or

(3) an agreement which would deprive the surrounding community of important specialized services that the lawyer provides.

These examples represent two possible methods of redrafting the rule. Provisions like these could be further explained, in the comments, regarding the inherent policy considerations. The comments could approach these problems from a balancing perspective, accounting for all relevant interests.¹¹¹

There are several possible methods of dealing with the tensions inherent in the rule. The above suggestions are proposals to generate a discussion of the rule. It would behoove the legal community to re-evaluate its position on these agreements and the implications they carry for the profession.

CONCLUSION

As a general rule, post-employment restrictive agreements are allowed if they fall within reasonable parameters. Drawing the boundaries, although an inexact science, usually depends upon the use of a balancing test. Among the general factors the courts weigh are the public's interest in those services, the employee's interest in working in his or her chosen profession, and the employer's protectible business interest. In addition, courts tend to favor covenant provisions that contain limitations on duration, geographical area, or the scope of activity covered by the restrictions. Finally, most courts state that the covenant can be no more restrictive than necessary to protect the employer's interest.

CONDUCT 801:2303 (limitation on direct solicitation of clients); Opinion 89-29 (1989), *summarized in* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 901:4324 (prohibiting the lawyer from mentioning the reasons for leaving the firm in a general letter telling the clients of his withdrawal from the firm).

111. The provisions of MCPR DR 2-108 could be redrafted in a similar fashion for those jurisdictions that have retained the Model Code of Professional Responsibility instead of adopting the Model Rules of Professional Conduct. Engaging in the exercise of proposing changes to the current rule, I acknowledge that at least one other author has done so. *See* Penasack, *supra* note 98, at 913-14. However, while the use of the word "substantially" is not a concrete one, I believe that it would be easier to apply with explicit comments or specific exceptions enumerated in the code than would Ms. Penasack's proposal. In addition, the use of the word "substantially" is more congruous with the language of the Model Rules, which uses the modifier extensively and even includes it among the definitions. *See* MRPC Terminology [10].

This is true even among highly trained or specialized professions, such as accountants or professionals involved in technological fields. One analogous example, in several key respects, is the medical field. Often non-competition contracts are upheld against doctors as long as they contain reasonable restraints. Doctors parallel lawyers in several important respects, particularly in the relative importance and prestige that each profession enjoys. Because the public at large has an interest in access to these services, courts must carefully consider the validity of restrictive agreements in these fields.

Contrary to the usual validity of doctors' agreements, which are upheld if reasonably limited, lawyers have enacted a self-policing rule that prohibits restrictive agreements, based on policy considerations that protect the public's access to these crucial services and protect the lawyer's right to practice law freely.

To accomplish these stated goals, most courts seem to impose a strict rule that any provision which directly or indirectly restricts the practice of law is void. However, not all courts have agreed that this provision, or others similar to it, must be enforced as a strict, almost *per se*, rule. Some courts, notably the California Supreme Court, have used a flexible interpretation.¹¹² One state has even abolished this rule altogether,¹¹³ suggesting that it is not absolutely crucial to the existence of our modern legal system.

The assumptions that undergird the rule are subject to challenge as well. It is not clear that the rule serves to protect a substantial right of the public. It is also not clear why a lawyer's right to practice law should be protected to a greater extent than any other professional's right to practice in their profession. In fact, because lawyers are in the best position to know the implications of their legal rights in signing a contract, they should be held to the commitments they have made. In a sense, they have a better capacity to consent to this waiver of their right to work. Enforcing them against other professions and trades while exempting those in the legal profession is contradictory and unfair. In talking to the Pharisees, "Jesus replied, 'And you experts in the law, woe to you, because you load people down with burdens they can hardly carry, and you yourselves will not lift one finger to help them.'"¹¹⁴

In evaluating whether this rule should continue, there are two considerations. First, are the goals of this rule valid? Second, given that these policies seem to have support in the eyes of the law and society, does the rule as currently applied further those policies in a fair manner? This is where the rule is subject to substantial scrutiny.

This rule can be criticized on several grounds. First, it is unclear whether the rule even works to secure the goals it promotes. It does not injure the public to enforce restrictive agreements in other professions, thus it should not injure the public to enforce the same contracts among lawyers. Second, a flexible rule might even serve the clients of the lawyer or firm better by providing a stable work atmosphere to efficiently handle the client's concerns. Third, lawyers have a

112. See *supra* notes 67-71 and accompanying text.

113. See *supra* note 104.

114. Luke 11:46 (New International Version).

significant duty to provide the public access to justice and should not have a rule that thumbs its nose at the standards which the public must follow. Fourth, by re-evaluating this rule, the profession will re-examine its dominant mores and ethical standards. This self-scrutiny can only help to raise the public's perception of the profession from current popular disfavor. Fifth, by promoting a rule that roughly parallels the law in other professions, it will promote consistency in the law.

The courts have several options for changing the rule. They could simply abolish the rule and adopt the common-law or reasonableness approach generally in use today among other professions. They could also choose to construe the word "restriction" more flexibly to allow room for reasonably limited covenants. Finally, the body that oversees lawyer discipline in each jurisdiction could redraft their current rule.

In a situation like *Blackburn*, a provision which allows lawyers to limit their advertising to definite and limited areas would fit within the confines of reasonableness. It would not prohibit lawyers from representing particular clients, and as long as their services were not so specialized that the community at large has a significant interest in those skills, the general public would not be injured.

It is in the best interest of the legal profession to examine this rule, its policies, and its effectiveness in depth. At a time when lawyers are receiving strong criticism, this old and scholarly profession should turn its talents inward to resolve a conflict that is symptomatic of other problems and serves only the profession. It is like the old Biblical saying: "Physician, heal yourself."¹¹⁵

115. *Luke 4:23* (New International Version).

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